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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of BECKY and JOHN VAN DOORN.	
BECKY VAN DOORN, Appellant, v. JOHN VAN DOORN, Respondent.	D042648 (Super. Ct. No. D449393)

APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

Initially, the trial court in this case awarded appellant $3,558 in monthly child support. The award was based on an income and expense statement in which appellant stated that she had no income. However, three months after appellant filed her income and expense statement, appellant obtained a vehicle loan on the basis of a credit application which stated that for more than a year and a half she had been earning $8,500

a month. In light of the credit application and other evidence of appellant's unreported income, the trial court set aside its initial award and awarded appellant $2,475 in monthly child support. The court also reapportioned a pre-existing federal income tax debt.

In setting aside its initial award, the trial court relied upon Family Code[1] section 2122, subdivision (b), which permits judgments and orders in family law matters to be set aside upon a finding of perjury in an income and expense statement submitted by one of the parties. Contrary to appellant's argument on appeal, the trial court was not required to find that she was guilty of perjury beyond a reasonable doubt. The burden under section 2122 is the ordinary burden proof prescribed by Evidence Code section 115: a preponderance of evidence. The record here was more than sufficient to meet that burden of proof. The record also shows that respondent brought appellant's perjury to the court's attention in a timely fashion. Accordingly, we affirm the trial court's order.

SUMMARY

2001 Support Award

Appellant Becky Van Doorn and respondent John Van Doorn were married for 13 years and had six children. Following Becky's petition for dissolution, they were able to reach agreement with respect to many issues. However, the trial court was required to set the level of child support. In support of her request for a substantial child support order, on February 8, 2001, Becky filed an income and expense declaration in which she stated that she had no net monthly disposable income. John filed a declaration in which he

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1 All further statutory references are to the Family Code unless otherwise indicated.

stated that he had a gross monthly income of $8,045. Given those income declarations, the trial court awarded Becky $3,558 ($593 per child) in monthly child support. The trial court also made John solely responsible for an existing indebtedness to the Internal Revenue Service (IRS).

2002 Modification

In October 2001 John discovered Becky had recently purchased a $610,000 home. She paid for the home with a $92,450 down payment and a deed of trust in the amount of $518,500. Discovery, including Becky's deposition, disclosed that she paid a total of $4,600 a month on the deed of trust and in property taxes. Becky took title to the property in her own name and as sole owner.

Further investigation and discovery revealed that on May 4, 2001, Becky had purchased a $45,238 sport utility vehicle (SUV). On a loan application she executed when she bought the SUV, Becky stated that she had been employed by "Altitude Exposure" for 17 months and that she earned a salary of $8,500 a month. The loan on the SUV required monthly payments of $711.

On May 23, 2002, John filed an order to show cause (OSC) in which he asked the trial court to modify the child support award and to relieve him from sole responsibility for the IRS debt.

At her deposition Becky stated that the information on the vehicle loan application was not true and that she had made the statements in the application at the direction of the dealership where she bought the SUV. By way of a declaration Becky further explained

that the engine in her old car had exploded and that the cost of repair would have exceeded her remaining equity in the car.

In addition to her deposition testimony and declaration, Becky submitted a declaration from a friend, Leon Havins. Havins's declaration stated in part: "I have known Becky Van Doorn since early 2001. Based on my friendship with her during the year 2001 through 2002, I have made gifts to her in the amount of approximately $212,000. I was not under obligation to make these gifts. Those gifts came directly from me, or from entities and individuals who made the transfers on my behalf. Those entities and individuals include GravityStorm, MiCasa Software, BMT Micro, and Polina Golub.

"I do not employ Becky Van Doorn, and none of the entities or individuals have employed Becky Van Doorn. These gifts were made of my own free will and not under any obligation on my part to make them."

The trial court granted John's OSC. Relying on Becky's loan application in which she stated that she had been earning substantial income long before she filed her income and expense declaration, the trial court found that Becky had committed perjury in filing the declaration. On the basis of that finding the trial court reduced John's child support obligation to $2,475 ($412.50 per child) a month. The reduced support order was made retroactive to February 13, 2001. The trial court also ordered that Becky pay one-half of the IRS debt.

Becky filed a timely notice of appeal.

I

Section 2122 states in pertinent part: "The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following:[¶] . . . [¶]

"(b) Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure, or waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury."

In enacting section 2122 the Legislature found that "[i]t occasionally happens that the division of property or the award of support, whether made as a result of agreement or trial, is inequitable when made due to the nondisclosure or other misconduct of one of the parties." (§ 2120, subd. (b).) Thus, the provisions of section 2122 create "an exception to res judicata, based on the recognition that '[t]he public policy of assuring finality of judgments must be balanced against the public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct.' [Citation.]" (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1144.)

II

In her principal argument on appeal Becky contends that the trial court was required to find that she was guilty of perjury beyond a reasonable doubt. She argues that because perjury is a criminal offense, the burden of proof required in a criminal proceeding is applicable under section 2122. We disagree.

Evidence Code section 115 states: " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

"*Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence*." (Italics added.)

Section 2122 does not itself provide any specific burden of proof and thus under the terms of Evidence Code section 115, a party may prevail under section 2122 with only a preponderance of evidence. (See *Pierce v. Harrold* (1982) 138 Cal.App.3d 415, 428.) Importantly, unless the statute in question expressly requires a higher degree of proof, " '[e]ven where the theory of the case [as here] involves the accusation of a crime, the burden of proving the crime . . . is met by *a preponderance of the evidence*; i.e. the high degree of proof demanded in criminal cases is not required in civil cases even on *the issue of crime* [citations].' [Citation.]" (*Id*. at p. 427, quoting Witkin, Cal. Evidence, § 208, p. 189.)

In *Pierce v. Harrold* a successful candidate for the former municipal court had filed a fraudulent declaration of her residency, a criminal offense under the Elections Code. Because the candidate had committed an offense under the Elections Code, the trial court annulled her election, ordered a new election and barred the candidate from participating in the new election. On appeal the court rejected the candidate's contention

that she was protected by the reasonable doubt standard of proof. Quoting the Supreme Court's opinion in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 290, footnote 8, the court stated " 'it has long been settled . . . in civil cases [that] even a criminal act may be proved by a preponderance of the evidence. [Citation.]' " (*Pierce v. Harrold, supra,* 138 Cal.App.3d at p. 427.)

Here the Legislature's adoption of the preponderance of the evidence standard as applicable to matters governed by section 2122 fully comports with the cases which have considered the circumstances in which a higher standard of proof might be required. As the court stated in *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490-1491: "The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. [Citation.] The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. [Citations.] Preponderance of the evidence results in the roughly equal sharing of the risk of error. [Citation.] To impose any higher burden of proof demonstrates a preference for one side's interests. [Citation.] Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights do not require a higher burden of proof. [Citations.]"

The intermediate burden of proof -- the clear and convincing standard -- is only required when the interests at stake are "more substantial than mere loss of money." (*Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804].) For instance, it is only personal liberty interests such as the termination of parental rights, involuntary civil

commitment and deportation which are protected by the clear and convincing standard. (See *Weiner v. Fleischmann* (1991) 54 Cal.3d 476, 487.) The highest standard -- proof beyond a reasonable doubt -- has been reserved for criminal and quasi-criminal proceedings where a person's personal freedom and reputation are both at stake. (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 40, p. 190; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223.)

In resolving John's section 2122 allegations, the interest most directly at stake was strictly monetary: the amount of child support John would pay, the amount Becky would receive and responsibility for the IRS debt. Because both parties have the same interest in the child support award and IRS debt, the preponderance of the evidence standard fully protected their principal interests. (See *In re Marriage of Peters, supra*, 52 Cal.App.4th at p. 1491.)

In sum, because section 2122 does not itself impose a higher standard of proof, allegations brought under the statute are established if they are proved by a preponderance of the evidence. (Evid. Code, § 115; *Pierce v. Harrold, supra*, 138 Cal.App.3d at p. 428.)

III

Contrary to Becky's contention, there was more than substantial evidence that in filing her February 1, 2001, income and expense statement she committed perjury.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence,

contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) This deference to the trial court's findings is required "whether the trial court's ruling is based on oral testimony or declarations." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479, fn. omitted.)

In reviewing this record, we note that Becky's credibility is subject to serious question. Her entire explanation of the discrepancy between her income and expense declaration and her loan application appears to be that, when circumstances required it, she felt she had the right to make a written material misrepresentation. Because Becky's explanation lacked credibility, in determining which of her statements was accurate -- the income and expense declaration or the loan application -- the trial court was largely left to the circumstantial evidence that she in fact had substantial means available to her at the time she filed the declaration. In particular, she was, in the months following her execution of the declaration, able to purchase a fairly expensive vehicle and a new home, which together imposed on her a fairly large monthly obligation. From these facts the court could reasonably conclude that at the time she incurred these substantial long-term obligations Becky fully expected that she would have the means of meeting them. This in turn fully supports the trial court's conclusion that the loan application was an accurate portrayal of Becky's monthly income and that the income and expense declaration was

not. Given that discrepancy the trial court could reasonably conclude that its prior order was based on perjury.

IV

Finally, Becky contends that John's OSC was untimely. She contends that under section 2122 John should have filed the OSC within one year after she signed the vehicle loan application in which she stated that she earned $8,500 a month. Because the loan application was signed on May 4, 2001 and John did not file his OSC until May 23, 2002, she argues that the OSC was time barred.

Becky ignores the fact that according to John's declaration he had no reason to suspect that her income and expense declaration was erroneous until October 2001 when he discovered that she had purchased a new home in her own name and that the purchase involved both a substantial down payment and a substantial mortgage. There is no evidence in the record showing that John was aware of or had reason to suspect the existence of the vehicle loan application before October 2001. Thus the trial court could reasonably conclude that the one-year limitation period provided by section 2122 did not commence to run until October 2001 and that John's May 23, 2002, OSC was therefore timely.

Order affirmed. Respondent to recover his costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.